

Decision **DRAFT DECISION OF ALJ PULSIFER** (Mailed 6/5/2002)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on the  
Commission's Own Motion Into Competition for  
Local Exchange Service.

Rulemaking 95-04-043  
(Filed April 26, 1995)

Order Instituting Investigation on the  
Commission's Own Motion Into Competition for  
Local Exchange Service.

Investigation 95-04-044  
(Filed April 26, 1995)

**ORDER DENYING PETITION FOR MODIFICATION****Summary**

This order denies a petition for modification seeking to either interpret Decision (D.) 98-10-058 (Decision) as including nondominant interexchange carriers (NDIEC) within the scope of coverage or to modify the Decision to include them. The Decision is clear as to its coverage and no basis for the requested modification has been shown. The petition also reflects various procedural infirmities.

**Background**

On April 2, 2002, the City of Riverside (City) filed a Petition for Modification/Clarification of D.98-10-058. In particular, the City seeks modification/clarification of those sections of the decision that relate to the Commission's "administrative adjudication process" for addressing rights-of-way disputes between facilities-based telecommunications carriers and local governmental entities. The City interprets this adjudication process as applying

to all categories of facilities-based telecommunications carriers, including particularly nondominant interexchange carriers (NDIECs). Specifically the City's Petition has reference to the following adjudication process outlined in D.98-10-058:

"The Commission's authority shall be exercised in the following manner. **In the event that a telecommunications carrier is unable to satisfactorily resolve a dispute with a local governmental body over the terms and conditions of access to a public [rights-of-way] ROW, we shall direct the carrier to file an application with this Commission seeking a certificate of public convenience and necessity for specific siting authority to gain access to the public ROW** pursuant to Chapter 5 of the PU Code, "Certificates of Public Convenience and Necessity." **We shall require that, prior to making such filing, the telecommunications carrier first make a good-faith effort to obtain all necessary local permits and to negotiate mutually acceptable terms of access with the local governmental body.** In order to be processed, the application must provide a demonstration showing that this requirement has been met. We intend to limit our inquiry in such applications only to a consideration of whether the actions of the local governmental body impedes a statewide interest in the development of a competitive market." (Decision at 39; emphasis added.)

The City states that it has an interest in this matter because, as a public entity charged with managing public rights-of-way, it is entitled to know if the Commission chooses to exercise jurisdiction over telecommunications carriers other than Competitive Local Exchange Carriers (CLCs) and Incumbent Local Exchange Carriers (ILECs).

Under Rule 47, parties must explain why a petition for modification of a Commission decision should be heard more than one year after the effective date of

the decision. More than three years have passed since the issuance of D.98-10-058. The City claims that its Petition for Modification is ripe for consideration by the Commission at this time because of recent developments in a court case currently pending in Riverside County Superior Court involving the City and Williams Communications, LLC (Williams), an NDIEC in California. The City claims that the ambiguity in D.98-10-058 did not become manifest until November 2000 when Williams notified the City that it was taking its rights-of-way dispute with the City directly to court. Until that time, the City claims that it did not anticipate that carriers would interpret the rights-of-way provisions of D.98-10-038 as being limited only to CLCs and ILECs.

In February 2001, Williams took its rights-of-way dispute with the City of Riverside to Superior Court in Williams Communications, LLC. v. City of Riverside et al. (Case No. RIC 354749.) (Williams v. Riverside.) Hearings were convened in late April 2002 and the parties are awaiting the judge's decision.

On February 8, 2002, the City filed a motion in Superior Court seeking a judgment on the pleadings in Williams v. Riverside (Motion), arguing among other things, that the rules adopted in D.98-10-058 govern rights-of-way disputes between local governmental entities and NDIEC, such as Williams. In support of its motion, the City included a declaration signed by an Assistant General Counsel for the Commission stating that he "confirmed that [D.98-10-058]'s holding regarding the procedure to resolve disputes between telecommunications carriers and local governments regarding the siting of

telecommunications facilities in the public rights-of-way, including non-dominant interexchange carriers.”<sup>1</sup>

The Motion was denied by the Superior Court Judge assigned to Williams v. Riverside on March 8, 2002.<sup>2</sup> In so doing, the Court did not make any findings, conclusions or holdings regarding the scope of D.98-10-058. As noted above, the matter proceeded to trial, and a Superior Court ruling is expected shortly.

The City of Riverside claims that it had no knowledge that D.98-10-058 would not apply to NDIECs and asks the Commission to modify D.98-10-058 so that it is clear that the Decision applies not only to facilities-based CLCs, but also to all other facilities-based carriers. The City argues that modification of D.98-10-058 is necessary to address the “conflicting interpretations” of the Decision. More specifically, The City states that the Superior Court “held that the Commission did not retain jurisdiction” notwithstanding the declaration that Riverside was able to obtain from the Commission’s Assistant General Counsel.

### **Responses to the Petition**

Comments in opposition to the Petition were filed on May 2, 2002, by Williams, Pacific Bell Telephone Company (Pacific), and the California Cable Television Association (CCTA).

Citing the pendency of a ruling in Williams v. Riverside, Williams’ does not address the merits of granting or denying the relief requested in the City’s Petition on a prospective basis (provided that NDIECs and others who are not parties or

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<sup>1</sup> See Exhibit 1 attached to City’s Petition (Declaration of Lionel B. Wilson dated December 5, 2001).

<sup>2</sup> A copy of the summary notice of denial of the motion is attached to the City of Riverside Petition as Exhibit 4.

respondents in the instant proceeding are provided adequate notice and opportunity to comment on the proposed modification). Williams does object, however, to the extent that the City seeks to apply the rules to NDIECs retroactively. Williams therefore argues that D.98-10-058 applies to CLCs, and that Williams was under no obligation as a NDIEC to avail itself of the dispute resolution rules established in D.98-10-058 prior to filing *Williams v. Riverside*. Williams contends that a recurring theme throughout D.98-10-058 and subsequent decisions is that the rules promulgated therein were intended to promote local competition, not long distance competition. While the decision and rules at times make reference to telecommunications carriers in general and specifically excludes certain types of carriers (*e.g.* cable carriers), at no time did it specifically include NDIECs. Moreover, Williams notes that Commission decisions granting NDIEC certificates of public convenience and necessity (CPCNs) do not reference or otherwise require NDIECs to comply with the rules established in D.98-10-058.

Pacific and CCTA take no position on the substantive merits of the Petition, but oppose it on the basis that the relief sought is procedurally improper. Pacific and CCTA state that the rules in D.98-10-058 were not applicable to NDIECs, and that expanding the rules as proposed without prior notice and opportunity to be heard would violate due process. Pacific and CCTA also argue that the Petition is moot in any event, since the rules in D.98-10-058 would still not be binding on cities such as Riverside. The City's dispute with Williams would still need to go before the Civil Court for resolution. CCTA claims that the City appears to be using the adjudication process for a site-specific CPCN as a procedural device to delay resolution of its dispute with Williams, not as a mechanism to resolve its dispute.

**Discussion**

Under Commission Rule 47(d), the City's petition for modification must explain why it could not have been presented within one year of the effective date of the Decision. Even assuming the City's claim was correct that it first became aware of the ambiguity in D.98-10-058 in November 2000, the City does not explain why it still waited over a year after that date to file its petition. Nonetheless, in the interests of promoting clarity as to the scope of D.98-10-058, we shall address the substantive merits of the City's Petition.

The City raises two separate issues in its pleading. First, the City raises the generic issue of "whether the Commission chooses to exercise its jurisdiction" over categories of carriers other than CLCs. Second, the City seeks much more specific action from the Commission with respect to a particular adjudication process that was prescribed in a specific Commission order to be used under certain specific circumstances.

Although the City briefly raises the broad issue of jurisdictional authority in a general sense, its particular focus is on only one aspect of an adjudication process that was adopted in D.98-10-058. Specifically, the City asks that D.98-10-058 be "clarified" to indicate the NDIECs are included within the scope of the adopted rules. Although the City claims that the scope of applicability of the Decision is unclear, we find no ambiguity in the Decision as to whether NDIECs were included within the scope of the rules.

The Decision expressly indicates the classes of carriers that are included within its scope. In the opening paragraph of the Decision, the scope of carriers to which the succeeding rules apply is defined as "all CLCs " competing within the territories of the major and midsized incumbent local exchange carriers. In Appendix A of the Decision, under Item II.J ("Definitions"), the term

“telecommunications carrier” is expressly limited to exclude interexchange carriers. The City provides no citations from Commission decisions that would indicate any ambiguity or contradictory indications as to whether NDIECs are included within the scope of the rules adopted in D.98-10-058.

The only basis offered by the City to support its claim that the Decision includes NDIECs is an affidavit of an Assistant General Counsel of the Commission in which the assertion is contained that NDIECs are included within the scope of D.98-10-058. Yet, the Commission officially adopts or amends its rules based upon due process through proceedings leading to Commission Decisions or Resolutions. An affidavit of an employee of the Commission’s Legal Division does not constitute the official order of the Commission. Accordingly, the affidavit of an Assistant General Counsel as offered by the City is not a proper foundation upon which to prove the intent of a Commission order. The City cites no Commission Decision that supports its claim concerning the scope of D.98-10-058. We therefore find no basis to conclude that any “clarification” of D.98-10-058 is needed in the form requested by the City.

In the alternative, the City asks that the Decision be modified to expand the scope of its applicability to expressly include NDIECs within the scope of the rules. Even if the City had provided a substantive basis to justify such modification, it could only be applied on a prospective basis. It would not be appropriate to apply the rules retroactively. Therefore, if a modification were to be adopted, it would not apply to the Superior Court dispute that is already pending between the City and Williams. Yet, the City offers no substantive justification to expand the scope of the rules adopted in D.98-10-058 to include NDIECs. Similarly, the City offers no substantive basis for the Commission to undertake the new inquiry that would be necessary to determine whether the

scope of existing rules in D.98-10-058 should be expanded to include NDIECs. Without a showing that a valid public interest would be served by expanding the scope of the rules in this manner, we find no compelling reason to commit the limited resources of the Commission and other parties to such a new proceeding.

Moreover, even if the Decision was modified as requested, it wouldn't preempt the jurisdiction of the Courts for disposition of the City's dispute. The provision in D.98-10-058 for carriers to seek a site-specific CPCN in connection with disputes with local governments is not binding on local governments. Even if this provision were extended to apply to NDIECs, the litigants would still have to take their dispute to civil court for binding adjudication.

Moreover, before any such modification could be considered, proper notice would need to be given to interested parties, including NDIEC's, as well as affected local government entities with opportunity to be heard. As a basis for developing the record underlying rights-of-way rules adopted in this proceeding, no notice has been previously provided to NDIEC's that the scope of the proceeding contemplated that rules would apply to all categories of carriers, including NDIECs. Moreover, such consideration, if undertaken, would belong more appropriately in another proceeding since the expressly stated scope of this rulemaking covers local exchange – not interexchange – competition.

The City's Petition for Modification is accordingly denied. In denying the City's petition and declining to initiate new proceedings concerning the applicability of rights of way rules in D.98-10-058, we do not intend to limit or circumscribe in any way the extent of jurisdictional authority that the Commission may otherwise possess or exercise in connection with NDIECs under governing statutes or Commission rules and orders other than D.98-10-058. We simply find that the City has not justified any basis to apply the specific adjudication process



outlined in D.98-10-058 to NDIECs, or to conclude that the rules adopted therein were intended to cover NDIECs.

### **Comments on Draft Decision**

The draft decision of Administrative Law Judge Thomas R. Pulsifer in this matter was mailed to the parties in accordance with Section 311(g) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on \_\_\_\_\_, and reply comments were filed on \_\_\_\_\_.

### **Findings of Fact**

1. The City has not demonstrated that any ambiguity exists regarding whether the provisions of D.98-10-058 relating to adjudication of rights-of-way disputes between cities and carriers applies to nondominant interexchange carriers.
2. The City has not provided any substantive basis to justify making a prospective modification of D.98-10-058 to include NDIECs within its scope, or to justify initiating a new rulemaking or investigation to consider whether such an expansion of scope is justified.
3. Decision 98-10-058 adopted rules regarding rights of way access that were expressly applied to local exchange carriers. Appendix A of the Decision expressly excluded interexchange carriers from its definition of “telecommunications carriers.”
4. The rules in Decision 98-10-058 relating to Commission authority to grant a site-specific CPCN in connection with disputes between municipalities and carriers were not binding upon local governments.
5. Any site-specific CPCN granted by this Commission under the process adopted in D.98-10-058 does not preempt the jurisdiction of the courts in connection with disputes between municipalities and carriers.

### **Conclusions of Law**

1. Because the City only served its Petition for Modification on the service list in the Local Competition Dockets, insufficient notice has been provided to NDIECs concerning the proposal to expand the applicability of the rules in D.98-10-058 to include NDIECs.
2. It would not be appropriate to apply the rules adopted in D.98-10-058 retroactively without giving prior notice to affected parties with an opportunity to be heard.
3. A declaration signed by an Assistant General Counsel for the Commission does not constitute an official pronouncement of a Commission order.
4. Denial of the petition and declining to initiate new proceedings concerning the applicability of rights of way rules in D.98-10-058 in no way limits or circumscribes the extent of jurisdictional authority that the Commission may otherwise possess or exercise in connection with NDIECs under governing statutes or Commission rules and orders other than D.98-10-058.
5. The Petition for Modification/Clarification of D.98-10-058 should be denied.

**O R D E R**

**IT IS ORDERED** that the petition for modification or clarification of Decision 98-10-058 filed by the City of Riverside is hereby denied.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.